Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-125

RICHARD J. GETTY,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY
EX REL KENTUCKY BAR ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

---

PETITIONER'S REPLY BRIEF

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D.C. 20036

RAYMOND FRANCIS CONNELL
326 Main Street
Paris, Kentucky 40361

Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-125

RICHARD J. GETTY,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY
EX REL KENTUCKY BAR ASSOCIATION,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

---

PETITIONER'S REPLY BRIEF

This Reply Brief is filed to call this Court's attention to three important factors relevant to this Court's consideration of this case.

1. THE STAY OF EXECUTION

On September 6, 1975, and in response to an application (No. A-71) that stressed the importance of the constitutional questions here at stake, Mr. Justice Stewart signed the following order:

> "IT IS ORDERED that the execution and enforcement of the judgment of the Court of Appeals of

> Kentucky in the above-entitled cause be, and the same is hereby, stayed pending this Court's disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue pending the issuance of the mandate of this Court."

Thus the execution of the judgment below, which ordered that petitioner be suspended from the practice of law for 6 months, has been stayed until this Court can consider the important constitutional due process questions at stake.

2. THE IMMINENT PENDENCY OF TWO OTHER PETITIONS RAISING THE SAME CONSTITUTIONAL ISSUES

This Court may wish to defer action on the instant petition until it can consider two other petitions for writs of certiorari to review similar disciplinary actions by the Court of Appeals of Kentucky. Those petitions are to be timely filed during the last week of September, 1975, and are entitled *John W. Collis* v. *Kentucky Bar Association* and *Neville Tucker* v. *Kentucky Bar Association.*[1]

Both the *Collis* and the *Tucker* petitions will raise substantially similar constitutional challenges to the procedures utilized in all three cases by the Court of Appeals of Kentucky. Those petitions will serve to further refine and sharpen those challenges, and will enable this Court to assess the alleged due process in-

[1] The first of the undersigned counsel on this Reply Brief is also the counsel preparing the petition in *John W. Collis* v. *Kentucky Bar Association.*

firmities in a broader light. Those petitions will further demonstrate that the constitutional questions are not limited to this case alone, and arise from procedures being universally applied by the Court of Appeals of Kentucky to the detriment of all Kentucky lawyers charged with unprofessional conduct.

Petitioner therefore urges that consideration of his petition be withheld until this Court can reach the *Collis* and *Tucker* cases. Since the *Collis* and *Tucker* petitions will soon be filed, before the end of September, they should be ready for consideration late in October or early in November, depending on the movement of this Court's certiorari docket.

In the interest of justice to this petitioner and to the other two Kentucky lawyers, Collis and Tucker, petitioner suggests that this Court may wish to defer action on the instant petition so that all three petitions may be considered and resolved together.

3. THE CONSTITUTIONAL QUESTIONS ARE SUBSTANTIAL

The constitutional questions that are common to all three cases are both important and novel, and fully warrant the grant of certiorari so that they may be definitely resolved. They arise out of disciplinary procedures that are utilized in many different states.[2] Hence the constitutional questions are of nationwide concern.

The Brief in Opposition filed herein by the Kentucky Bar Association serves, somewhat inadvertently, to

[2] See, e.g., New Jersey Supreme Court Rule 1:20; Maryland Ann. Code, Art. 10, §§ 11-23; Illinois Rev. Stat. § 110A.

highlight the two basic constitutional questions at stake, to wit:

(a) Is the Complete Absence of Any Opportunity for a Hearing Before the Board of Governors a Denial of Due Process?

It is undenied that the proceedings before the intermediate advisory body, the 15-man Board of Governors, are held *in camera.* The accused lawyer is given no notice and no opportunity to appear before the Board to plead his case or to argue in support of, or in opposition to, the findings and recommendations of the subordinate trial body, the 3-man Trial Committee. Nor does he have any chance to urge that the Board acquit him of all charges.

But can such a complete denial of due process be excused on the theory that the Board's actions are "only advisory" to the Court of Appeals of Kentucky?[3] That theory certainly evaporates whenever the Board exercises its power to acquit the accused lawyer. The Court's own rule, Rule 3.370, provides that

> "If the respondent be found not guilty, the Board's action is final."

The Board thus appears to be the final adjudicative body with respect to "not guilty" determinations.

If that be true, has not this petitioner been denied a valuable due process right to appear before the Board

[3] RCA 3.370 provides that any recommendation by the Board that disciplinary action be taken by the Court of Appeals "shall be advisory." The court itself has repeatedly stressed that the Board's recommendations are "only advisory." *Kentucky State Bar Association* v. *Stivers,* 475 S.W. 2d 900, 903 (Ky. 1971). See also Brief in Opposition, p. 11.

and urge that it find him "not guilty" of all charges?[4] In *Southern Railway Co.* v. *Virginia,* 290 U.S. 190, 197-198 (1933), this Court held that when an administrative body is "empowered, without notice or hearing, to act with finality upon [its] own opinion," the "inhibitions of the Fourteenth Amendment" outlaw the administrative body's action in rendering an unfavorable final determination. The question left unresolved by this Court is whether the same result follows when the administrative body, having denied all opportunity to urge upon it a favorable final determination, fails to render such a determination—a determination that might have been made had the Board given this petitioner the rudiments of a due process hearing. So elementary, yet unresolved, a question arising under the Fourteenth Amendment deserves resolution by this Court.

That question is exacerbated, of course, by the fact that at the time of the Board's *in camera* action, the petitioner had not been advised of the Trial Committee's findings and recommendations. Hence at that point was he not additionally denied the constitutional right "to be fairly advised" of the committee's action and "to be heard upon its proposals" before the Board, the administrative body that could finally determine his innocence on the basis of the evidence before the Trial

[4] Seemingly contrary to Rule 3.370, the Court of Appeals in this case found the petitioner guilty of three counts in Charge II as to which the Board of Governors found him "not guilty." But the Board had found him guilty on another count in Charge II, and the Court of Appeals agreed. Perhaps the Court believes it can review the entire case if the Board has found the attorney guilty on any one count or charge, and change any "not guilty" determinations it wishes upon such a review. The propriety of the Court of Appeals' actions in this respect is not at all clear.

Committee? See *Morgan* v. *United States,* 304 U.S. 1, 18-19 (1938).

(b) Since the Court of Appeals Proclaims Itself To Be the Sole Judge of All Factual Issues, Does Its Failure To Hold a Full Factual Inquiry Constitute a Denial of Due Process?

The Court of Appeals has repeatedly asserted and exercised its self-proclaimed principle that

> "In any event, the report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this Court . . . . This means, of course, that in the end this Court must be judge of the factual as well as the legal issues and of the final action to be taken. The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding." *Kentucky State Bar Association* v. *Stivers,* 475 S.W. 2d 900, 903 (Ky. 1971).

In this case, as in all Kentucky disciplinary proceedings, the Trial Committee did hold a full evidentiary hearing in compliance with due process requirements. But the impact of that due process hearing was lost by the time the case reached the ultimate and *de novo* fact-finder, the Court of Appeals. While that court had the written transcript of the Trial Committee hearing before it, the Court of Appeals deemed itself free to ignore the committee's findings, to assess the facts as the court saw fit, and to make its own determinations as to the credibility of witnesses or other evidence. No attempt was made to approve or disapprove the Trial Committee's fact findings in light of any form of a substantial evidence standard.

Now it is true that "The demands of due process do not require a hearing, at the initial stage or at any

particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 152-153 (1941). But that principle would appear inapplicable if the results of "the requisite hearing" are totally ignored, or are considered advisory only, by the ultimate fact-finder. Indeed, that seems to be the implication of the decision of this Court in *Willner* v. *Committee on Character,* 373 U.S. 96, 104 (1963), a bar admission case. The Court there held that where the Appellate Division of the New York Supreme Court had held no hearings of its own to determine an applicant's character, but relied entirely upon the inadequate report of a 3-man committee, the Appellate Division could not escape the requirement of due process by claiming that the committee's action was merely advisory.

The precise question left unresolved is whether a committee's action that is truly advisory and that is totally ignored can provide the fact-finding Court of Appeals an escape from the requirements of due process. Is not the Court of Appeals then obliged to provide a due process hearing of its own if it is to make its own fact findings, independently from those found by the Trial Committee? That is the important question that deserves attention by this Court.

A final word needs to be said about the argument in the Brief in Opposition (pp. 6-9) that the decision below rests on adequate non-federal grounds. The answer to that argument is that the petitioner did raise the foregoing federal constitutional claims before the Court of Appeals. Its failure to discuss them operates as a denial of those claims, making it impossible to

interpret the opinion as resting solely on adequate non-federal grounds. *New York ex rel. Byrant* v. *Zimmerman,* 278 U.S. 63, 67 (1928).

CONCLUSION

For these reasons, supplementing those in the petition, this petition for writ of certiorari should be granted at the time when this Court also has before it the *Collis* and *Tucker* petitions.

Respectfully submitted,

EUGENE GRESSMAN
1828 L Street, N.W.
Washington, D.C. 20036

RAYMOND FRANCIS CONNELL
326 Main Street
Paris, Kentucky 40361

Counsel for Petitioner

September 18, 1975